

**Office of  
The City Attorney  
City of San Diego**

**MEMORANDUM  
MS 59**

**(619) 236-6220**

**DATE:** August 13, 2019

**TO:** Civil Service Commission and Personnel Director

**FROM:** City Attorney

**SUBJECT:** Roles of Civil Service Commission and Personnel Director in Determining Applicant Qualifications for City Employment in Classified Positions Subject to SDPD Security Background Checks

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**INTRODUCTION**

The Civil Service Commission and Personnel Director have sought this Office's legal opinion concerning their roles in determining an applicant's qualifications for City employment in a classified position with the San Diego Police Department (SDPD) or a classified position in another City department requiring unescorted access to SDPD facilities.

**BACKGROUND**

Applicants for classified civilian (non-sworn) positions within the SDPD who have received a conditional job offer are required by the SDPD to pass its security background check prior to starting work.<sup>1</sup> The background check looks at criminal history, drug usage, driving history, employment history, unreported criminal conduct, and acts involving breach of trust, among other things. The screening also involves a polygraph examination to verify truthfulness. If an applicant is disqualified for employment in the position sought based on the results of the background check, the applicant can appeal the disqualification to the Civil Service Commission.<sup>2</sup>

Applicants for classified positions with other City departments (e.g., Fleet Operations Department) who have received a conditional job offer for a position requiring unescorted access to SDPD facilities as part of the job's duties (e.g., Auto Parts Stock Clerk) are also required by the SDPD to pass its security background check in addition to the Personnel Department's review of each applicant's conviction history. The SDPD requires its additional security screening for these individuals because the individuals may have access to police vehicles, public safety equipment, and criminal evidence. If such an applicant is determined by the SDPD to have

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<sup>1</sup> State law provides minimum selection standards for sworn peace officers. Because they are subject to a different evaluation process, hiring decisions for sworn peace officers are beyond the scope of this memorandum.

<sup>2</sup> The SDPD makes disqualification decisions in the first instance for positions in the SDPD. If an applicant appeals, the decision goes to the Civil Service Commission. The Personnel Director decides in the first instance for other departments.

failed SDPD's background check, the Personnel Director reviews the concerns of the SDPD regarding the applicant and determines whether disqualification is warranted. If the applicant is disqualified for employment in the position sought, the applicant can appeal the disqualification to the Civil Service Commission.

Nothing prohibits the SDPD from requiring its extra level of review for prospective employees who will work in the SDPD or have unescorted access to its facilities, and the Civil Service Commission and Personnel Director may lawfully consider most of the information obtained during SDPD's security background check.<sup>3</sup> There may be instances, however, in which the SDPD determines that an applicant has not passed its security background check, and thus, is not appropriately qualified for a certain position due to security concerns, and the Civil Service Commission or Personnel Director disagrees.

### **QUESTIONS PRESENTED**

1. For those applicants who have received a conditional job offer for a classified position in a City department other than the SDPD, requiring unescorted access to SDPD facilities, what is the role of the Personnel Director? What deference is given to the SDPD's determinations?

2. For those applicants who have received a conditional job offer for a classified position in the SDPD, are disqualified based on the results of SDPD's security background check, and subsequently appeal to the Civil Service Commission, what is the role of the Civil Service Commission? What deference is given to the SDPD's determinations?

### **SHORT ANSWERS**

1. The Personnel Director's role is the same as it is in regard to applicants for all other classified positions. While the results of SDPD's security background check should be considered, the Personnel Director has the discretion and authority under the Civil Service Rules and regulations to accept, reject, or disqualify an applicant for any classified position.

2. The role of the Civil Service Commission is to hear the disqualified applicant's appeal pursuant to the Civil Service Rules. While the results of SDPD's security background check should be considered, the Civil Service Commission retains ultimate discretion and final decision-making authority regarding the rejection or disqualification of an applicant for any classified position when the applicant appeals.

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<sup>3</sup> For positions in departments other than the SDPD, state law prohibits consideration of a record of arrest or detention that did not result in conviction. Cal. Gov't Code § 12952; Cal. Lab. Code § 432.7.

## ANALYSIS

### **I. THE CHARTER AND CIVIL SERVICE RULES PROVIDE THE LEGAL FRAMEWORK FOR THE SELECTION OF EMPLOYEES FOR POSITIONS IN THE CLASSIFIED SERVICE**

Section 41 of the San Diego Charter (Charter) provides for a Civil Service Commission consisting of five members, who shall be appointed by the Mayor, subject to the confirmation of the San Diego City Council (Council). Under Charter section 115, the Civil Service Commission “shall have supervision over the selection, promotion and removal of all employees of the City subject to the Civil Service provisions of this Charter.” The Civil Service provisions of the Charter apply to all those positions included in the classified service. Charter, art. VIII.

The Civil Service Commission is charged with recommending to the Council all rules for the government, supervision and control of the classified service, i.e., the Civil Service Rules, to be adopted by ordinance. Charter § 118. The Civil Service Rules, once adopted by ordinance, have the force and effect of law. *Id.* The Personnel Manual is a body of administrative regulations, developed by the Personnel Director and ratified by the Civil Service Commission, which provide specific procedural instructions and necessary policy interpretations of the Civil Service Rules and employment regulations. San Diego Municipal Code (SDMC or Municipal Code) § 23.1603.

#### **A. The Personnel Director Accepts, Rejects, or Disqualifies Applicants for Positions in the Classified Service**

The Charter provides that the Personnel Director “shall be appointed by the Civil Service Commission and shall have all powers and perform all duties prescribed” in Section 116 of the Charter. Charter § 37. Under Charter section 116, the Personnel Director “shall serve as Secretary of the Commission. He shall act as Chief Examiner and superintend the examinations, subject to the direction of the Commission. He shall perform such other duties as are prescribed by this Charter, by ordinance, or by the Commission.” *See also* SDMC § 23.1601 (stating same). The Personnel Director is expressly responsible under the Charter for determining which applicants are eligible for appointment under the Civil Service Rules to any classified position needing to be filled. Charter §§ 121 and 122. Additionally, under the Municipal Code, it is the duty of the Personnel Director to carry out and enforce all adopted Civil Service Rules and regulations. SDMC §§ 22.0401 and 23.1601.

Civil Service Rule II, Section 6, describes the circumstances under which an applicant may be rejected or disqualified for employment in the position sought. SDMC § 23.0306(a). Rule II, Section 6, enumerates a list of declared causes for rejection or disqualification, but notes that “other” causes not listed may also constitute a basis. *Id.* The enumerated causes for rejection or disqualification include when the Personnel Director finds the following in regard to an applicant:

- (a) lacks any of the minimum qualifications as stated in the examination announcements;
- (b) is physically or mentally so disabled as to render the applicant unfit for performance of the duties of the class or subdivision thereof;
- (c) habitually or excessively uses habit-forming drugs or intoxicating beverages which would adversely affect job performance or public safety;
- (d) has been previously dismissed from any military or public service for inefficiency, delinquency, or misconduct, which would adversely affect job performance or public safety; or has been terminated or had his/her name removed from any eligible list for cause, or has resigned from City service under charges; and where job performance or public safety would be adversely affected by employment of the applicant;
- (e) has been guilty of any crime which would adversely affect job performance or public safety;
- (f) has knowingly made a false statement of any material fact, or has practiced or attempted to practice any deception or fraud in an application or examination;
- (g) has failed to notify the Commission of a change of address after filing application for examination.

*Id.* Additionally, the Personnel Manual provides the policy for consideration of an applicant's criminal convictions prior to employment, including whether job performance or public safety could be affected.

The Civil Service Commission's policy is to evaluate an applicant's criminal conviction record on the basis of its relationship to potential job performance in terms of the recency, frequency, and the nature of the offense involved. The purpose of this policy is to exclude only those individuals whose criminal conviction record indicates that job performance in the position applied for or public safety could be adversely affected.

Personnel Manual, Index Code C-3, Section II. "Anyone who is convicted of a misdemeanor or felony may be rejected at the discretion of the Personnel Director if it appears that job performance or public safety could be adversely affected because of the recency, frequency, and/or the nature of the offense involved."<sup>4</sup> Personnel Manual, Index Code C-3, Section II(A).

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<sup>4</sup> In the case of a position for which the State of California has designated a legal minimum acceptable conviction record, the state standards will be sufficient cause for rejection. Personnel Manual, Index Code C-3, Section II(B).

Similarly, anyone who receives an undesirable, dishonorable, or bad conduct military discharge may be rejected at the discretion of the Personnel Director based upon the same criteria defined for felonies and misdemeanors. Personnel Manual, Index Code C-3, Section II(E).

The Personnel Manual provides that all candidates receiving a conditional job offer for City employment in a classified position will be required to complete and submit to the Personnel Department a conviction record form and participate in a fingerprinting process for a Department of Justice and Federal Bureau of Investigation background check prior to starting work.<sup>5</sup> Personnel Manual, Index Code C-3, Section III(A); *see also* SDMC § 23.0304(d).

In accordance with the Personnel Manual,

The Personnel Director will review the candidate's conviction record in relation to the specific duties and requirements of the position sought. If the candidate's conviction record appears to be rejectable, further information may be sought as to extenuating circumstances surrounding convictions, character references, or any other information relative to the candidate's suitability for employment.

Personnel Manual, Index Code C-3, Section III(B).

If a candidate's conviction record is determined to be rejectable, "the candidate will be either disqualified for all City positions or disqualified only for certain positions and or departments. Candidates who are disqualified for employment because of conviction records will be advised of their appeal rights to the Commission." Personnel Manual, Index Code C-3, Section III(C).

### **B. The Civil Service Commission Hears Appeals of Disqualified Applicants**

Civil Service Rule II, Section 6, provides that any person "whose application is rejected may, within five (5) working days after notice of rejection or disqualification, appeal in writing to the Commission for a review of such ruling.<sup>6</sup> The Commission shall afford such appellant an opportunity to be heard. This decision on review shall be final." SDMC § 23.0306(b).

Under the Civil Service Rules, an applicant who has received a conditional job offer for a classified position within the SDPD, but has subsequently been determined by the SDPD to be disqualified based on the results of its security background check, has the right to appeal the

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<sup>5</sup> Candidates for sworn peace officer positions in the SDPD are excepted; such candidates "will provide conviction record information directly to the Police Department as a part of the appointing authority selection process." Personnel Manual, Index Code C-3, Section III(A)(1). Subject to some exceptions, state law prohibits employers from inquiring into or considering an applicant's conviction history prior to a conditional offer, or considering for purposes of hiring any record of arrest or detention that did not result in conviction. Cal. Gov't Code § 12952; Cal. Lab. Code § 432.7. Applicants for peace officer positions and positions with the SDPD fall into the exceptions and are not covered by these state laws. Cal. Gov't Code § 12952(d); Cal. Lab. Code § 432.7(e).

<sup>6</sup> "Notice" occurs when the applicant is advised that he or she has been disqualified for employment in the position sought.

disqualification decision to the Civil Service Commission, and Commission's decision is final. SDMC § 23.0306(b). Notably, the Commission has the express discretion to accept or reject an applicant based on the applicant's conviction or arrest for any crime or infraction.<sup>7</sup> SDMC § 23.0304(d).

**II. ALTHOUGH THE SDPD HAS A ROLE IN THE PROCESS, THE CIVIL SERVICE COMMISSION AND PERSONNEL DIRECTOR ARE NOT REQUIRED TO DEFER TO SDPD REGARDING APPLICANT QUALIFICATIONS**

When the Civil Service Commission hears an appeal, there is no particular rule related to SDPD security background checks. There is no requirement of deference to the security concerns of the SDPD. The Civil Service Commission has been charged with supervising the selection of all classified employees, and the Chief of Police's power to appoint SDPD personnel is expressly subject to the Civil Service Rules and regulations. Charter §§ 57 and 115. As with other evidence, the Civil Service Commission can decide what weight to give the SDPD's security concerns when hearing an appeal.

Similarly, when an applicant for a classified position with another City department, such as Fleet Operations, has received a conditional job offer pending the outcome of SDPD's security background check, the Personnel Director has the discretion and authority to consider the SDPD's security concerns. However, based on the results of the background check, the Personnel Director may decide that that the results do not disqualify the applicant and the applicant is suitable for City employment in a classified position involving unescorted access to SDPD facilities. *See* Charter §§ 116, 121, 122; SDMC §§ 22.0401, 23.1601, 23.0306; Personnel Manual, Index Code C-3. Nothing in the Charter, Municipal Code, Personnel Regulations, or state law requires deference to the security concerns of the SDPD.

However, while the Civil Service Commission and Personnel Director have the ultimate discretion and authority to determine applicant qualifications for positions in the classified service, the SDPD does play a role in the process. The Charter provides that the "Police Department shall consist of a Chief of Police and such other officers, members and employees as the Council may from time to time prescribe by ordinance." Charter § 57. Under the Charter,

The Chief of Police, with the approval of the City Manager, shall appoint, direct and supervise the personnel, *subject to Civil Service regulation*, have charge of the property and equipment of the department and exercise all powers and duties provided by general laws or by ordinance of the Council. The Chief of Police shall have all power and authority necessary for the operation and control of the Police Department.

*Id.* (emphasis added).

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<sup>7</sup> Generally, the City may not consider for purposes of hiring any record of arrest or detention that did not result in conviction, but certain exceptions apply, as previously noted. Cal. Gov't Code § 12952; Cal. Lab. Code § 432.7.

Read together, we interpret the Charter sections as creating a system of checks and balances. The SDPD may, for policy reasons, impose additional security background checks for prospective employees who will work in its department or have unescorted access to its facilities, and the information obtained from those background checks may inform hiring decisions. However, the Civil Service Commission and Personnel Director retain the ultimate discretion and authority to determine whether an applicant is qualified for City employment in the classified service, weighing the information obtained in the background check in relation to the specific duties and requirements of the position and the applicant's potential job performance, just as the Civil Service Commission and Personnel Director do for any other classified position in the City.

### CONCLUSION

The SDPD may, for policy reasons, impose additional security background check requirements on prospective employees of the SDPD or those who will have unescorted access to its facilities, and the Civil Service Commission and Personnel Director should consider any SDPD concerns about applicants based on the background check results. However, the Civil Service Commission and Personnel Director retain the ultimate discretion and authority to determine an applicant's qualifications for City employment in any classified position, including positions in the SDPD and positions requiring unescorted access to SDPD facilities.

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By /s/ Kristin M. J. Zlotnik  
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cc: David Nisleit, Chief of Police